UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

NICK KIKALOS and HELEN KIKALOS,	)	
Plaintiffs,	)	
v.	)	Cause No. 2:98CV618 PS
UNITED STATES OF AMERICA,	)	
Defendant.	)	

COURT'S FINAL JURY INSTRUCTIONS

Date: _____

_____
Philip P. Simon, Judge
United States District Court

Instruction No. 1

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you instructions concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply the law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by me.

Neither by these instructions, nor by any ruling or remark I have made, do I mean to indicate any opinion as to the facts or as to what your verdict should be. You are the sole judges of the facts.

Instruction No. 2

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in this case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

The fact that the plaintiffs are individuals and that the defendant is the United States of America must not enter into or affect your verdict. All parties are equal before the law, and each should be given the same fair and equal treatment by you. You are to decide the case solely and exclusively on the evidence alone, except that you shall be guided at all times in your deliberation by the law as the Court gives it to you.

Instruction No. 3

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes sworn testimony of the witnesses, the exhibits admitted into evidence, evidence judicially noticed, and any stipulated facts. A stipulation is an agreed statement of facts between the parties, and you should regard such agreed statements as true. Any evidence to which I sustained an objection or that I ordered stricken must of course be disregarded. The only issues to be determined by you are those which I will set out in detail later in these instructions.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their respective sides of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding on you.

So while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

In determining any fact in issue you may consider the testimony of all witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

Instruction No. 4

There are two types of evidence: direct and circumstantial. Direct evidence is the direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances that tend to show whether or not an asserted fact is true. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict

Instruction No. 5

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness you should consider: the witness's relationship to any of the parties; the witness's interest, if any, in the outcome of the case; the witness's manner of testifying; the witness's opportunity to observe or acquire knowledge concerning the facts about which he or she testified; the witness's candor, fairness and intelligence; and the extent to which the witness's testimony has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The testimony of a single witness that produces in your minds a belief in the likelihood of its truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

Similarly, the weight of the evidence is not necessarily determined by whether the evidence is in the form of a document or the oral testimony of a witness. It is for you to determine based upon the circumstances surrounding each document and each piece of testimony what weight to give to that evidence.

Instruction No. 6

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters at issue in this trial.

Instruction No. 7

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

If you believe that any witness has been so impeached, then it remains your exclusive province to give testimony of that witness such credibility or weight, if any, that you think it deserves.

Instruction No. 8

When any witness is questioned about an earlier statement that the witness may have made, or earlier testimony that the witness may have given, such questioning is permitted in order to aid you in evaluating the truth or accuracy of the witness's testimony at the trial. In addition, if that earlier statement was made under oath and is inconsistent with the witness's testimony at the trial, you may consider that earlier sworn statement as evidence of the truth or accuracy of such earlier statement.

Whether or not such prior statements of a witness are, in fact, consistent or inconsistent with the witness's trial testimony is entirely for you to determine.

Instruction No. 9

The purpose of the attorneys' opening statements is to acquaint you in advance with the facts the attorneys expect the evidence to show. The purpose of the attorneys' closing arguments is to discuss the evidence actually presented. Opening statements, closing arguments and other statements of counsel should be disregarded to the extent that they are not supported by the evidence.

During the course of a trial it often becomes the duty of counsel to make objections and for me to rule on them in accordance with the law. The fact that an attorney made objections should not influence you in any way. Nor should the nature or manner of my ruling on any objection influence you in any way.

Whenever I have sustained an objection to a question addressed to a witness you must disregard the question entirely, and draw no inference from the wording of it, or speculate as to what the witness would have said if he or she had been permitted to answer the question. You should also disregard any answer the witness may have given prior to my ruling on the objection.

Instruction No. 10

Certain charts and summaries have been shown to you in order to help explain facts that are in evidence in the case. These charts or summaries are not themselves evidence or proof of any facts. If the charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, the charts or summaries are used only as a matter of convenience. To the extent that you find they are not truthful summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

Instruction No. 11

The burden of proof in this case is by a preponderance of the evidence, which means that you must be persuaded considering all of the evidence in the case, that the proposition on which the party has the burden of proof is more probably true than not true. When I say "if you find" or "if you decide" I mean if you find or if you decide by a preponderance of the evidence.

Instruction No. 12

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him or her what he or she would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

Instruction No. 13

During the trial, certain testimony was presented to you by the reading of a deposition. This testimony is entitled to the same consideration you would give it had the witness personally appeared in court.

Instruction No. 14

You have heard testimony of expert witnesses. This testimony is admissible where the subject matter involved requires knowledge, special study, training, or skill not within ordinary experience, and the witness is qualified to give an expert opinion.

However, the fact that an expert has given an opinion does not mean that it is binding on you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given to the expert opinion in light of all the evidence in the case.

Instruction No. 15

In this case, the Internal Revenue Service conducted an audit of the Kikaloses' 1988 and 1989 federal income tax returns. You are instructed that the Internal Revenue Service routinely audits taxpayers like the Kikaloses, and merely because the Kikaloses' tax returns for 1988 and 1989 were reviewed by the Internal Revenue Service and additional taxes were assessed, and the deficiencies, penalties and interest were paid by the Kikaloses, should not be considered by you as any admission of wrong doing on behalf of the Kikaloses.

Instruction No. 16

In the course of the audit, the IRS determined that the Kikaloses failed to keep adequate books and records from which it could determine the Kikaloses' income. You are instructed that the law requires every person that is liable for any tax imposed by the Internal Revenue Code to keep such records, render such statements, make such returns and comply with such rules and regulations as the IRS may from time to time prescribe. These records are defined by the IRS to include the taxpayer's regular books of account and such other records and data as may be necessary to support entries on his books of account and on the return. This Court has determined that the Kikaloses books and records were inadequate to determine their income.

Instruction No. 17

When a taxpayer's books and records are not adequate, the IRS is authorized to reconstruct the taxpayer's income by any indirect method which in its opinion does clearly reflect the income of the taxpayer.

Instruction No. 18

The Internal Revenue Service used the percentage markup method to reconstruct the Kikaloses income. The percentage markup method is an accepted indirect method of reconstructing income where a taxpayer's records are incomplete, inaccurate, or inadequate.

Instruction No. 19

The burden of proof in this case is on the Kikaloses. This means that the Kikaloses must establish by a preponderance of the evidence, for each of the two tax years here at issue – 1988 and 1989 – the following four elements:

1. That the assessment by the Internal Revenue Service was arbitrary;
2. That the Kikaloses are entitled to a refund of taxes;
3. That the Kikaloses have proved the amount of the refund to which they are entitled; and,
4. That the government has declined to pay the refund.

If you find that Plaintiff's have proved each of these elements by a preponderance of the evidence, then your verdict should be for the plaintiffs. If, on the other hand, the Plaintiffs have failed to prove any of these elements by a preponderance of the evidence, then your verdict should be for the defendant.

Instruction No. 20

The first issue you will need to determine is whether the Internal Revenue Service's determination of liability for the Kikaloses' 1988 and 1989 tax years was arbitrary. A decision is arbitrary if it is without any rational basis.

Instruction No. 21

Indirect methods of establishing income are estimates of a taxpayer's income and thus are inherently inaccurate. Where a taxpayer did not maintain adequate books and records, making it necessary to use an indirect method of proof, it is to be expected that the resulting assessment might not be accurate. Thus the question is not whether the IRS assessment was accurate, but whether the IRS assessment was without a rational basis or was arbitrary.

Instruction No. 22

If you should find that the tax liability resulting from the Internal Revenue Service's determination was without a rational foundation, you must then determine a second question for the tax years 1988 and 1989. That question is whether the Kikaloses have proven, by a preponderance of the evidence, a different tax liability than the liability determined by the IRS, and thus that they have a right to a refund of the taxes paid.

Instruction No. 23

Upon retiring to the jury room, you should first select one of your number to act as your foreperson. The foreperson will then preside over your deliberations and act as your spokesperson here in court.

You will take verdict forms with you to the jury room. When you reach unanimous agreement as to your verdict, the foreperson should fill in the appropriate verdict form, all of you should sign it, and then you should tell the court security officer to inform me that you have reached a verdict.

If, during deliberations, you should desire to communicate with the court, please reduce your message or question to writing and have the foreperson sign the note and include the date and time. Then, pass the note to the courtroom security officer, who will bring it to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you in person.

With respect to any message or question that you provide to the court during your deliberations, please be advised of the following rules. First, do not state or specify, your numerical division at any time; that is, do not inform the court or even hint at how many among you were or are in favor or against reaching any particular verdict. Also, please be advised that the court cannot supply you with transcripts of any of the trial testimony.

Instruction No. 24

This case will be submitted to you with special interrogatories. This means that I will give you a series of written questions that you will need to answer in coming to your verdict. Follow the instructions on the special interrogatories and when you reach a unanimous agreement, the Jury Foreperson should fill in the answers to the questions and then fill in the appropriate verdict forms.

Instruction No. 25

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own view, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts. Your sole interest is to seek the truth from the evidence on the case.